UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 24 CR 140 (PAE)

JONATHAN MOYNAHAN LARMORE,

Conference

Defendant.

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New York, N.Y.
May 15, 2024
11:00 a.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
JUSTIN RODRIGUEZ
Assistant United States Attorney

SETH BRIAN WAXMAN
Attorney for Defendant

(Case called)

MR. RODRIGUEZ: Good morning, your Honor. Justin Rodriguez, for the United States.

THE COURT: All right. Good morning, Mr. Rodriguez.

MR. WAXMAN: Good morning, Judge. Seth Waxman, on behalf of the defense. And Mr. Larmore should be on the phone with us. I'd appreciate the Court's indulgence allowing him to do so.

THE COURT: Very good. Good morning, Mr. Waxman.

And, Mr. Larmore, are you, in fact, on the phone?

THE DEFENDANT: Yes.

THE COURT: All right. Good morning to you, Mr. Larmore.

I'll ask you to mute the phone except when you are called upon, which may or may not even occur.

But, Mr. Waxman, just for clarity's sake, you are moving for your client to be permitted to participate remotely?

MR. WAXMAN: Correct, your Honor.

THE COURT: I'm happy to do that. This conference is really more administrative than substantive, a lot of planning we need to do, but, ultimately, it's the sort of thing for which the defendant's remote appearance is justified, and I'm mindful of the significant cost item it would be to attend a conference like this.

With that, I have a number of areas to take up with

you, and then, to the extent I've left something uncovered, I'll give counsel an opportunity to raise those issues.

Let's just begin with discovery.

Mr. Rodriguez, at the initial conference, you set out the areas of Rule 16 discovery that you had provided and, to some degree, what remained outstanding. Let me follow up on a few specific areas, and then I'll ask you if there are other items to take up.

One issue involved Mr. Larmore's cell phone, and you indicated that there was a privilege review that was ongoing, and that afterwards, a responsiveness review had to take place.

Where are you on that?

MR. RODRIGUEZ: Yes, your Honor.

So, the privilege review for Mr. Larmore's phone was completed around April 23rd, so about three weeks ago. That privilege review took a little longer than we would have liked, for two reasons.

The first is, we needed a list of attorneys from Mr. Waxman that Mr. Larmore was working with that we should be on the lookout for, and that list was quite extensive. And we got that information on March 15th, March 20th, and on April 4th.

Once we had all of that information, and our privilege review team conducted their work, they found that there were quite a few communications that needed to be marked as

potentially privileged. So just to give the Court one data point, approximately 5,000 emails were extracted from Mr. Larmore's cell phone, and the review team marked approximately 2400, so almost half, as potentially privileged. So the scope of potentially privileged material made this process go a little longer than we anticipated.

As I mentioned, that process concluded about three weeks ago, and we have been working very hard on the responsiveness review since then. We expect to be finished with our responsiveness review on the phone within the week.

THE COURT: Okay. Thank you. Let me follow up on that.

When was the phone imaged for the defense?

MR. RODRIGUEZ: So the warrant was executed on March 14th. We accessed the phone pretty quickly thereafter because we have the password. We asked for a drive from the defense, and we sent a copy to the defense of the entire phone on March 26th.

THE COURT: Got it.

With the privilege review, when you tagged 2400 or so emails out of 5,000 as potentially privileged, does the inquiry stop there, or are they simply tagged as privileged, or does the privilege review team then burrow further to determine whether the 2400 is, to some degree, an overdesignation?

MR. RODRIGUEZ: So what happens is we get a memo from

the privilege review team that's almost akin to a privilege log, and it will say something like, you know, an email string with Mr. Larmore and Mr. Waxman was marked as privileged.

THE COURT: Right.

MR. RODRIGUEZ: Something like that, we're not going to dig into any further because there's a very good chance that, you know, we have reason to believe that is privileged.

There are a number of other variations of that where, for example, there may be a third party present, and we look into that a little bit more. For example, Mr. Waxman also represents Mr. Larmore's mother in the SEC case, and so we sort of assume that there's probably a joint defense privilege there or something like that. So there is some additional analysis that happens. We haven't gone back to Mr. Waxman, for example, and said, hey, you know, we've generally marked this category of information as potentially privileged, you know, would you like to explain the basis for that, or something like that. But that could happen, your Honor. Candidly, I don't anticipate that that will happen, based on my review of the privilege team's work so far.

THE COURT: In other words, for the time being anyway, you're going to treat the approximately 2400 that were marked as potentially privileged, you're going to treat them as privileged?

MR. RODRIGUEZ: That's right, your Honor. Unless we

learn something else to call into question those designations, that's our plan going forward.

THE COURT: Okay.

Switching gears, and also within discovery, you had a reference in our last conference to credit card, bank, and brokerage records. Have those been produced?

MR. RODRIGUEZ: So, yes, your Honor. And what might be helpful here is, after our last conference, as the Court may remember, I submitted a letter on April 16th, which detailed the government's productions on March 19th, 25th, 26th, and April 9th. And so there were a number of productions there that were covered.

Since that letter, the government has made two additional productions on May 8th and May 14th. What I'm happy to do is give the Court as much or as little information it would like on those productions --

THE COURT: How about an overview of those productions?

MR. RODRIGUEZ: Very good, your Honor.

So, in total, in those two productions, there were about 13,000 pages. The biggest chunk of that was about -- I'm sorry, there were about 14,000 pages. The biggest chunk of that was about 13,000 pages of American Express statements, so those would be the credit card records that had been referenced last time. This set of documents was actually received from

the receiver in the SEC action, which had access to those records, but that's what they are.

Other categories of documents at a very high level: About a hundred pages of documents from WeWork. Mr. Larmore had rented an office space at WeWork for the entity that is at issue here, Cole Capital Funds. There were additional documents received from another receiver in Indiana, who was a receiver over certain entities related to Mr. Larmore, a small number of documents from the SEC that I believe Mr. Larmore already had, such as their order of investigation and a subpoena that was previously issued to him.

So those are the big categories of documents.

THE COURT: Okay.

Do you have any outstanding Rule 16 discovery?

MR. RODRIGUEZ: Yes, your Honor, a couple of items.

So I received a call on Monday from one of the brokerage firms that we had subpoenaed who had previously told us that they were unable to locate any recorded phone calls with the defendant. They have since found some recorded phone calls with the defendant. I received that call on Monday of this week. I asked that the brokerage firm, or the bank, really, produce them as quickly as possible, which they told me that they intended to do, but they have not yet produced them. So that is one bucket of outstanding material.

The other bucket is, we do have a pending request to

the receiver in the SEC action. In January of this year, the receiver visited a receivership property where Mr. Larmore was living, and they discovered some shredded documents, and so we have subpoenaed those shreddings to see if there is anything that we can do to make sense of them. So we have not received those from the receiver yet, but we do expect to receive them shortly.

That is all in terms of pending Rule 16. One other item is: We did receive this week additional search warrant returns from Apple. And I have requested a drive from Mr. Waxman, and we expect to be able to produce the full set of those returns shortly after he provides that drive.

We will then do the same process of conducting a privilege review and a responsiveness review on that set of materials. We hope that this time around, we will be more efficient because we now have a universe of known attorneys and such, but we do want to reassure the Court that we are devoting significant resources to this, and we're mindful of our obligation to get it done as reasonably quickly as we can.

THE COURT: Great.

Just as to the brokerage firm and recorded calls, have you any sense of scale?

MR. RODRIGUEZ: I don't. I did ask that question. My sense is that the attorney, the in-house attorney, who I spoke to, has not yet himself reviewed them. He's got to get them

converted. So I don't, your Honor.

THE COURT: Okay.

Google had, I think, said to you that they didn't have any records, according to what you said last time, and you were skeptical of that. I think maybe that was in your April 16th letter.

Any follow-up on that?

MR. RODRIGUEZ: That's correct, your Honor.

We were skeptical of that, and the short answer is that remains the information that Google has given us, which is to say that they do not have any content to provide.

This is a little bit of a hypothesis, but what happened here is once the receivership was put in place, the receiver sort of took over the email atmosphere, so to speak, and perhaps that had something to do with they stopped subscribing. Because this is an enterprise account, it's an @ArciTerra.com domain name, it's not an @gmail.com domain name, so perhaps they stopped paying the bills or something like that, but we're not quite clear.

A reason why we haven't pressed too hard on Google is because we have subpoenaed the receiver, who has made a production of emails --

THE COURT: Okay.

MR. RODRIGUEZ: -- in that regard.

THE COURT: That leads me to my next question. Other

than what you've identified — for example, the shredded materials — is there any material outstanding from the receiver of Cole Capital, Mr. Allen Applbaum?

MR. RODRIGUEZ: No, your Honor.

THE COURT: All right.

Anything else with respect to discovery?

MR. RODRIGUEZ: I guess two minor points, your Honor:

One, I think I mentioned last time, which is, I've identified all of the sort of things that I know to still be out there. Of course, our investigation is continuing, and so to the extent that we issue additional process or come across new material, we'll certainly produce that promptly.

The other thing that I will mention — and I'm not asking the Court for any relief at this point — is, just so that the record is clear, we did issue a written demand to the defense for reciprocal Rule 16 discovery, and I have not received any yet.

THE COURT: You mentioned that in the letter.

Before we move on to anything else, let me just ask Mr. Waxman, anything in the area of discovery?

MR. WAXMAN: Yes, your Honor, just two points.

I hear the prosecutor talk about getting a password from my client. I'm curious --

THE COURT: Sorry, I didn't catch that.

MR. WAXMAN: I'm sorry, getting a password to my

client's phone that enabled him, enabled the government, to move quickly with the privilege review and disclosures. I'm just curious, through the Court, if I could ask the government how they obtained that password --

THE COURT: I didn't even hear that being said.

Mr. Rodriguez, is that right?

MR. RODRIGUEZ: I do believe Mr. Waxman is correct.

My understanding is that the FBI knew the password to the phone to access it rather than using some software to access it.

THE COURT: You had indicated, I think, at the initial conference that that familiar problem of accessing a locked phone wasn't one in the case because the FBI had access.

I don't think you had specified at the conference how the FBI got access. I think Mr. Waxman's question presupposes that it was obtained from the defendant.

MR. RODRIGUEZ: Understood, your Honor.

And I don't have the case agent here, so I don't want to venture into something that I don't know. I think there's a couple of possibilities here, and I am happy to follow up with both Mr. Waxman and the Court. For example, the phone may have already been opened --

THE COURT: Sorry, if you're just speculating, it's not worth going there.

MR. RODRIGUEZ: Very good, your Honor.

THE COURT: Mr. Waxman, I take it, to cut to the chase here, you're exploring a scenario under which the phone's password was given by your client to the government, and then you would want to explore whether something in that receipt of information breached some constitutional provision?

MR. WAXMAN: Correct, your Honor.

THE COURT: Okay.

Look, because one of the things, Mr. Rodriguez, I'm about to get to with the defense will, in short order, be suppression motions, that information needs to be gotten to him like right away. The answer may well be that there's no issue there, but if it were to turn out that, for example, questioning of the defendant revealed the password, then I think the earlier representation, which is that there had been no postarrest statements, would need to be corrected. But, in addition, without commenting on legal conclusions, it would be the sort of thing that would be fodder for a potential motion.

MR. RODRIGUEZ: Understood, your Honor. We will get on that right away.

THE COURT: Okay.

MR. WAXMAN: Thank you, your Honor.

Is the government able to provide us the name of the brokerage firm or bank that found these additional recorded messages?

MR. RODRIGUEZ: Yes, your Honor. It's City National

Bank.

MR. WAXMAN: Thank you.

Nothing further.

THE COURT: Mr. Waxman, I take it you're not experiencing any issues with respect to the discovery you've received?

MR. WAXMAN: None thus far, your Honor.

THE COURT: Is the scale about what had been described --

MR. WAXMAN: Correct.

THE COURT: Okay.

The next issue is the SEC action in Arizona involving, as I understand it, two buckets of claims, one being the alleged investment fraud involving ArciTerra and the other being the WeWork stock manipulation alleged here.

What's the status of that case, Mr. Rodriguez?

MR. RODRIGUEZ: Your Honor, on April 22nd, the district court in Arizona granted the government's motion to stay discovery in that action pending the completion of this case. That was done with the consent of the SEC and with Mr. Larmore.

My understanding is that Mr. Larmore also largely consented to the entry of a preliminary injunction order and to the continuation of the receivership and asset freeze that is in place in Arizona. I think there is a pending motion by

Mr. Larmore to remove and replace the current receiver in Arizona, but seeking to replace him with a new one and not objecting to the existence of the receiver. So I think that's the only action going on in the SEC matter.

THE COURT: Did that action proceed to discovery at all before discovery was stayed?

MR. RODRIGUEZ: I think there was a small amount of discovery that was provided. So, for example, my understanding is, if I have this right — and Mr. Waxman can correct me — that Mr. Larmore produced some American Express statements as part of discovery, and I believe that the SEC also produced some discovery as well.

THE COURT: And I know that you've taken the position that the SEC is not part of the investigative team, but do you know whether such discovery, as was presented, produced in that case, has that become part of the discovery in this case by some means?

MR. RODRIGUEZ: Yes, your Honor. So I did ask -- I essentially got from the SEC those materials and produced them as part of the discovery in this case.

THE COURT: Okay.

Any reason to think any of that is outstanding?

MR. RODRIGUEZ: No, your Honor.

THE COURT: Okay.

Next question — I raised this last time: Are there

any non-SEC civil lawsuits out there that bear in any way on Mr. Larmore, whether it's ArciTerra or this case?

MR. RODRIGUEZ: Your Honor, there were a number of civil lawsuits that preceded the SEC case, which were stayed.

THE COURT: Dealing with ArciTerra, not WeWork?

MR. RODRIGUEZ: Correct, your Honor.

I'm aware of none dealing with WeWork. Simply in the ArciTerra bucket.

THE COURT: Nobody has brought a civil lawsuit claiming any harm based on the conduct alleged in this case involving, you know, this fake tender offer or allegedly fake tender offer?

MR. RODRIGUEZ: Not that I am aware of, your Honor.

THE COURT: All right.

Let's turn, then, Mr. Waxman, to the issue of the suppression motions, and I asked you to be prepared to tell me at this conference whether you had anything you were moving to suppress.

MR. WAXMAN: Yes, your Honor.

I think there is a potential to suppress the phone, cell phone, and your Honor has already touched on some of the key factors that would go into that. That is the only suppression motion that we view at this time.

THE COURT: Mr. Waxman, does whether you make that motion turn on the means by which the passcode, if it was even

made available to the government at all, was made available? It may have come in unlocked form or something, but --

MR. WAXMAN: Correct.

I don't think there's a basis to challenge the issuance of the search warrant. I believe it's the events that took place during the execution of that search warrant that may be contested or at issue. In other words, my understanding is there were no *Miranda* rights given, and as your Honor intimated, if there was an interrogation that elicited an incriminating response, such as the password, that that would, in our belief, be a basis to potentially suppress.

THE COURT: Right. And the government has represented to us so far that there was no postarrest statement, and I assumed at the time implicitly that that meant no statement at all, not a statement that you regarded as just a passcode.

You're going to find out, Mr. Rodriguez, whether that's wrong.

Mr. Rodriguez, I assume you can figure that out within a matter of days, right, if not a day?

MR. RODRIGUEZ: Exactly, your Honor. It's going to be the first phone call I make after this conference.

THE COURT: So, look, Mr. Waxman, let's just, for argument's sake, assume that you get an answer that leads to a motion. Articulate for me what the motion might be.

MR. WAXMAN: Yes. It would be --

THE COURT: Is it that there would be a *Miranda* or some other Fifth Amendment violation in the receipt of that information?

MR. WAXMAN: Correct. Your Honor, there might be a Fourth and a Fifth Amendment violation in that regard. Most obviously, if there was an incriminating response that was given in response to an interrogation, it's plainly stated that an agent said, give me your password, and my client said, here it is, and then gave him the four or five numbers, it's our position that that would be an interrogation that was required to comply with Fifth Amendment standards, and, as a result, if not, then the cell phone would be suppressed.

THE COURT: But the theory is a *Miranda* theory?

MR. WAXMAN: *Miranda* and a potentially Fourth Amendment seizure issue as well. I'd have to think that through a bit more, but it would be based on the same operative facts.

THE COURT: If there was -- again, we're just hypothesizing. But assuming a fully compliant *Miranda* warning that preceded it, does the issue go away? Does everything turn on the absence of a *Miranda* warning?

MR. WAXMAN: Potentially, your Honor.

THE COURT: Okay.

So let's assume, for argument's sake, that you get information -- let me actually interrupt myself.

I don't want you to communicate for me verbatim anything your client has said, but do you have a reason to think that your client might have given that information?

MR. WAXMAN: I do, your Honor. And the more facts and circumstances that the government gives us, I think it will facilitate a well-crafted motion, to the extent there is one that should be submitted to the Court, and assist the Court in its analysis.

THE COURT: All right.

MR. WAXMAN: Of course, my client, as you can probably imagine, there were many, many SWAT members with machine guns, and he had a pregnant fiancee standing next to him, so the circumstances of that were jarring, to say the least, so his memory of exactly what transpired and what happened first, second, and third, I think, might not be as strong as a professional law enforcement officer who does this for their job.

THE COURT: One of the questions will be if you get a memo that says there was a *Miranda* warning, and he said the password is 1234, whether your client is in a factual position to create a factual dispute about that point?

MR. WAXMAN: That's a possibility, your Honor. I'm pretty clear that there wasn't a *Miranda* warning given, although I wasn't there, of course, so I'll have to wait to see what the government produces.

THE COURT: Right.

MR. WAXMAN: But I'll just share this with the Court for the benefit of the prosecutor: As I understand it, my client's fiancee was also present, and there may have been interactions with her with law enforcement, so to the extent we can get any facts and circumstances that relate to either of those individuals, that would be helpful.

THE COURT: Okay. Yes.

So, Mr. Rodriguez, this is a developing little subcorner of Fifth Amendment law anyway, but maybe there's a Fourth Amendment dimension involving locked -- entering cell phones. The more detail you can give Mr. Waxman, the sooner he can figure out if he's got a viable motion.

Mr. Waxman, assuming you're given a proffer by Mr. Rodriguez in the next couple of days, how soon can you file a motion, if there was one to be filed?

MR. WAXMAN: Your Honor, we had proposed amongst the parties a schedule. We had suggested July 14th, and then there's an entire schedule that we, myself or the prosecutor, can certainly lay forward for the Court.

THE COURT: Sure.

I take it you're envisioning more than suppression motions, but other motions as well?

MR. WAXMAN: Correct.

THE COURT: What do you have in mind before we talk

about the schedule?

MR. WAXMAN: Oh, I'm sorry.

Government 404(b) notice is something that's important. Also, the government's asked us to make our insanity disclosure, to the extent there is going to be one. I can tell the Court I don't believe there is. But those three items would track the three dates and a hearing proposed hearing date that the government and I have discussed.

THE COURT: All right.

Before I get the schedule, I appreciate that there's likely to be motions along the familiar lines of following a 404(b) notice motions in limine filed by one or both sides, but other than that, and other than the possible phone suppression motion, is there thinking else? There's no facial attack on the indictment, anything like that?

MR. WAXMAN: No, your Honor.

THE COURT: All right.

Why don't you tell me what the schedule that you had jointly agreed on was.

MR. WAXMAN: Well, we had talked about dates, I don't want to presume that we've agreed, but, in any event, the dates we propose are July 14th for any defense motions, including a defense motion to suppress and any insanity defense notice. I don't believe there's going to be, but we certainly are able to make that disclosure by the 14th of July.

In addition, on that same date, the government would provide us 404(b) notice.

On July 28th, responses --

THE COURT: I think, by the way, my deputy, Mr. Smallman, tells me the 14th is a Sunday.

MR. WAXMAN: I apologize.

THE COURT: I assume you want to push all those days one day forward, to the 15th, right?

MR. WAXMAN: Correct.

THE COURT: So, the 15th for the defense motions and the 404(b) notice.

And then on the 29th, what do you have in mind?

MR. WAXMAN: The 29th would be responses, in other words, the government's opposition to any motion and any motion that we would like to file in response to the 404(b) notice.

THE COURT: Okay.

MR. WAXMAN: And then on August 5th, if I haven't picked another weekend — that's a Monday — would be replies from both sides to those substantive motions and notices.

THE COURT: Right. These are effectively motions in limine, right?

MR. WAXMAN: The suppression, suppression, but, yes, motions in limine with regard to 404(b).

THE COURT: Right.

MR. RODRIGUEZ: Your Honor, I apologize. I just

wanted -- before we got too far down the road, this was not the government's proposal with respect to 404(b). We're tracking so far in terms of defense pretrial motions under 12.2, but the government has a different proposal with respect to 404(b).

THE COURT: Yes.

And what's a little confusing here is that, ordinarily, I'd have a schedule for motions in limine in which each side would be making its motion and the other side would respond. I think your schedule here doesn't provide for the government's making motions in limine, and usually both sides have something to initiate.

MR. WAXMAN: Yes, your Honor. And the reason for that, and why we've carved out 404(b) in our minds, is that the question of whether ArciTerra evidence is going to come in or the government's going to seek to have that kind of evidence moved in really changes the entire dynamic of this case. In other words, the WeWork allegations are a fairly constrained amount of facts to a fairly discrete period of time, all probably taking place within a couple of months of September to November 2023. ArciTerra spans decades and involves a receivership that's overseeing hundreds of entities.

So to facilitate a trial date that I know your Honor has set and not to run into any massive issues, if the government is really intending to say that a lot of ArciTerra evidence should come in, we thought it would be better to get

that sifted out early, ask the Court to rule on it early, and see how that plays.

Of course, I think, not surprising to the Court, the defense is going to suggest to the Court, ultimately, that it should be a very limited set of evidence, if any at all, but, of course, we don't know how the Court will rule --

THE COURT: Yes. But regardless, you have in mind that essentially as to the, quote-unquote, ArciTerra evidence, if the government is pursuing any of it at all, that issue would be litigated on a defense motion which was catalyzed by a 404(b) notice as opposed to a government motion to admit ArciTerra.

MR. WAXMAN: Correct. I guess I can file a motion in limine now just saying we want to keep it out, but --

THE COURT: No, it's better for the government to think on this and formulate what concretely, if anything, it has in mind.

The only issue is -- well, let me ask you: Is there more to the schedule that you were going to propose?

MR. WAXMAN: And then a hearing date of the week of August 12th on these issues.

And then there are two other dates --

THE COURT: And the hearing date, I don't know what you mean by "these issues." If it's something like ArciTerra, it's likely to be resolvable on the papers. If it's a

suppression motion, there may well be an evidentiary dispute.

MR. WAXMAN: Yes, my apologies. The suppression motion hearing.

THE COURT: All right.

Do you have any other dates before I hear from Mr. Rodriguez?

MR. WAXMAN: August 18th -- I'm sorry, August 16th, the government's expert disclosure and any advice-of-counsel defense that the defense intends to employ at trial. That would be August 16th.

And then September 16th would be the defense expert disclosure.

THE COURT: Okay.

Is that it from you?

MR. WAXMAN: And then the final issues are: Witness lists, exhibit lists, and Rule 3500 disclosures. Again, this case does have a fairly narrow set of facts, given the kinds of cases this Court hears. I will note that ArciTerra obviously makes this much more complicated if there is evidence that is sought to be admitted in that regard. All that put together, we would suggest a disclosure date of witness lists and exhibits and Rule 3500 statements fairly early in this matter. I had suggested to the prosecutor August 1st. I know that the government feels that that's far too early, but we would ask the Court to impose a deadline maybe somewhat atypical,

especially given that the summer months are sometimes easier for us to dig in, and when we turn to that post Labor Day time frame, courts have set a lot of things for me, it just becomes a much more hectic time frame. So to the extent the Court could give me some of that period in August, that would be helpful.

THE COURT: There is nothing in your schedule, though, that anticipates other motions in limine. In other words, the premise of your motion, really, is that the only evidentiary motions, if you will, that might be litigated are the ones that trip off the government's 404(b) notice, which may or may not include ArciTerra, it may include other things, but there are usually a bunch of other issues.

When did you have in mind litigating those?

MR. WAXMAN: Candidly, we have not discussed a secondary motion in limine schedule. I think the government has in mind all one together, and I have, obviously, taken a different view.

There are other substantial motions in limine that I can see coming down the pike. One I'll just give an example of is short selling. We believe short selling is a -- naked short selling is a significant factor in the WeWork analysis, and I think the government's at least intimated in at least one email to me that they don't believe that's relevant.

THE COURT: You need to unpack that. I don't

understand what you're referring to.

MR. WAXMAN: Yes, I'm still working with experts to get my arms all the way around it, but there is substantial evidence of naked short selling that went into this. We have a significant --

THE COURT: By other people?

MR. WAXMAN: By other people, correct.

And that impacts some of the incentives and issues and actions that took place during the relevant time period. So we would, in all likelihood --

THE COURT: Supposing that were established, what element does it tend to negate or respond to?

MR. WAXMAN: So, your Honor, we haven't fully developed that at this stage. We're also waiting to digest the government's discovery, which has been voluminous. So I really raise that issue just to give the Court an example of something that's potentially out there that I suspect will be subject to motions in limine. There may be others. We just have not, at this point, digested entirely the government's discovery. We certainly have spent a lot of time dealing with the SEC's case out in Phoenix, and that case only having been recently stayed, and we have a substantial challenge to the receiver out there, and so we are, candidly, really turning to this case in full very recently. But I didn't want to make it sound like the 404(b) notice as to ArciTerra is really the only substantive

motion in limine that we forecast. I think there might be a host of motions in limine that the Court certainly can entertain and decide.

THE COURT: Yes, no, I just want to make sure we have a rational schedule which isn't cluttered with too many different dates.

Let me ask you, Mr. Rodriguez, do you have a proposal?

MR. RODRIGUEZ: Yes, your Honor.

I guess let me start with where I think we're on common ground, which is: The government does agree that for the defense motions other than 404(b), sort of the suppression motion that was contemplated, the July 15th, July 28th, August 5th schedule is agreeable to --

THE COURT: So for any suppression motion, July 15, July 29, August 5th, for opening by the defense, opposition by the government, and reply by the defense?

MR. RODRIGUEZ: That's correct.

THE COURT: For suppression?

MR. RODRIGUEZ: For suppression motions.

And to the extent between now and then, there are other pretrial motions, such as an attack on the indictment --

THE COURT: He's foresworn that, I think.

MR. RODRIGUEZ: Understood, your Honor.

MR. WAXMAN: Correct, your Honor.

MR. RODRIGUEZ: So the other -- I think we agree

July 15th should be the date for Rule 12.2 notice.

THE COURT: One second.

(Pause)

THE COURT: July 15th? Okay.

MR. RODRIGUEZ: And, again, that's a little broader than insanity defense, but any and all 12.2 notice.

Again, just continuing with agreed-upon dates here, for August 16th, so two months in advance of trial, the government's expert disclosures, as well as the defense advice-of-counsel disclosures. I don't think there's much of a dispute here, but just to put a finer point on it, because at least I'm very sensitive to the issues this can raise, we've asked the defense for a pretty fulsome disclosure here on who the attorneys would be, you know, what advice, and if there's any and all documents that they would rely upon. And I am happy to explain to the Court the relevance of this particular case.

THE COURT: Let me just ask, Mr. Waxman, just to avoid an issue: Is there any chance that such an attorney is you?

MR. WAXMAN: Is me? No.

THE COURT: Okay.

MR. RODRIGUEZ: So that we're asking for robust advice-of-counsel disclosures on the 16th of August.

And then September 16th for defense expert disclosures.

THE COURT: All right. So far, I take it those are all agreed upon?

MR. RODRIGUEZ: That's my understanding.

MR. WAXMAN: Correct.

THE COURT: Okay.

And now what is not agreed upon?

MR. RODRIGUEZ: Now, in terms of motions in limine, I was prepared to defer to the Court and the Court's preference about how far in advance of, let's say, the final pretrial conference the Court would like motions in limine. My proposal is whatever schedule the Court sets for that, that the government would provide written 404(b) notice three weeks in advance of motions in limine. That would then give the defense an ample opportunity to decide should we move to exclude something so that the parties can discuss, and issues around 404(b) can be litigated on the same schedule as other motions in limine. And I am prepared today to discuss with the Court, in considerable detail if the Court would like, what the government's thinking is on both ArciTerra, as well as other potential motions in limine.

THE COURT: Give me an overview of what you have in mind. You're not binding yourself, but it would be helpful.

MR. RODRIGUEZ: So big picture, your Honor, it is not the government's intention to fully prove up what Mr. Waxman, I think correctly, describes as a more than a decade-long course

of activity at ArciTerra. In other words, it's not the government's intention to prove up the truth of the misappropriation and commingling allegations that the SEC has sued Mr. Larmore on.

However, there are various ways in which those allegations and ArciTerra would fit into the trial, and I'm happy to go through a few of those.

So, number one is, at the time of the WeWork scheme, there was significant negative publicity about the allegations against Mr. Larmore of misappropriation. He had been sued by prior investors in ArciTerra, investors who had not been paid for something like four years. There was publicity in Bloomberg and an article published on The Real Deal.

The government would seek to admit the existence of those allegations — not their truth, but the existence of those allegations — because it's relevant to whether or not it was reasonable for Mr. Larmore to believe that he could go get $77 million worth of financing for the WeWork transaction when those allegations would be out there and available to any prospective lender.

THE COURT: Sorry, in other words, it assists your case to show that, in light of those allegations, Mr. Larmore was effectively not going to be able to amass money in the traditional way?

MR. RODRIGUEZ: Yes, your Honor. Regardless of

whether they're true or not, they're out there, and they're something that a reasonable lender could rely upon in deciding whether to loan Mr. Larmore $77 million to make a significant WeWork tender offer. So that's one way we think ArciTerra comes in.

THE COURT: Look, we'll litigate all of this if it's going to be an issue, but I take it one of the issues that would be presented by any such offer of proof would be the level of generality or specificity at which the existence of some unresolved allegation is put?

MR. RODRIGUEZ: Absolutely, your Honor, yes. I'll be the first to admit that there are certain details in the press that the government will not seek to admit or that, on balance, the Court would be well within its discretion to exclude, yes.

THE COURT: Were there pending regulatory charges or just civil litigation charges at the time coming out of ArciTerra?

MR. RODRIGUEZ: Just civil. The SEC was investigating, but had not filed, and no other regulatory filings at the time of the WeWork scheme.

THE COURT: Would the SEC investigation have been known to a potential lender or only the existence of pending civil lawsuits?

MR. RODRIGUEZ: I can't think of why it would be known to a lender.

THE COURT: So the issue — again, we'll see how it presents once you've all dug into this — but the issue might be an effort by you to admit the fact that there were civil lawsuits pending that made certain claims as a drag on his ability to obtain financing?

MR. RODRIGUEZ: Yes, your Honor.

THE COURT: All right.

MR. RODRIGUEZ: Another way ArciTerra could come up: Before the WeWork scheme, there was a separate receivership in the State of Indiana over certain ArciTerra entities. In the summer of last year, Mr. Larmore sold a Gulfstream plane of his and received about $1.2 million in proceeds. He used a lot of those proceeds to buy the WeWork securities in this case.

At the time, however, the receiver in Indiana took the position that that $1.2 million belonged to the Indiana receivership, and filed a motion to hold Mr. Larmore in contempt. There was a contempt hearing in November at which Mr. Larmore testified about the use of those proceeds and was cross-examined. It will be the government's submission that Mr. Larmore provided untruthful testimony about what he did with those proceeds, and that that's comparable to a false exculpatory statement that should come in.

THE COURT: But did the false statement in some way bear on this case?

MR. RODRIGUEZ: Yes, because the question was what did

you do, in substance, with the $1.2 million? A truthful answer would have been, well, I used them to buy these WeWork securities as part of a market manipulation scheme. Instead, Mr. Larmore said, you know, he used them for, quote-unquote, living expenses and that he hadn't taken the time to reconcile them.

THE COURT: So it's being offered as consciousness of guilt?

MR. RODRIGUEZ: Yes, your Honor.

Here's another way, again, because a key issue is what was Mr. Larmore's financial condition at the time of this scheme. The judge in Indiana found Mr. Larmore not credible and granted the receiver's motion for contempt, and ordered him to return the $1.2 million. Mr. Larmore, however, at that time — and this is November 15th, so it's only a few days after the WeWork scheme — did not have the money to purge his own contempt. So he had to borrow $1.2 million from his mother, again, showing his financial condition at the time and his inability to actually reasonably expect that he would have or be lent $77 million for the WeWork scheme.

I've also mentioned that there's been a number of documents we've received from the receiver in the SEC action. Right now, the receiver is the corporate custodian of Cole Capital Funds, which is the entity that Mr. Larmore used for the WeWork scheme. So to the extent I had to call a corporate

custodian of this entity to talk about — and I expect I would — that this was really a sham entity with no employees, no assets, nothing like that, it would be a member of the SEC receivership team, and I think we would have to explain, so that's --

THE COURT: Look, this gives me enough of an idea. I get the gist of it.

Putting aside motions in limine that deal with ArciTerra, including, but not limited to, the examples you've given, are there other categories that you can, right now, foresee of motions-in-limine litigation?

MR. RODRIGUEZ: Yes, your Honor. So one would be a motion by the government to preclude anything from the defense about the length of the government's investigation or the timing of its charges, especially as they relate to the timing of the SEC case.

Mr. Larmore has made allegations in the SEC case, which he has repeated here, but, in substance, that the SEC, quote-unquote, contacted my office and, quote-unquote, manipulated us into bringing the indictment when we did. And we think, in addition to being completely untrue, it's totally irrelevant to any issue that would be presented at trial.

We would also move to preclude any irrelevant or prejudicial information about the circumstances of Mr. Larmore's arrest — the number of agents, the fact that he

was with his pregnant partner at the time, the fact that they were ordered to come out with their hands up, things like that. I know Mr. Larmore has recently welcomed a new child to the world, and that was the person who was pregnant with him. We think any mention of that is irrelevant and prejudicial.

So there are motions like that that I anticipate.

THE COURT: Let me just throw out the following: Putting aside what the dates are, it sounds rather clear to me there is going to be beefy motion-in-limine litigation here and a good chance that each side will have motions in limine to bring.

My own instinct, just based on experience, is that it's simply easier to dole all these together rather than have an ArciTerra schedule and then another schedule. So whatever the dates are, my instinct would be that the right sequence here is to start off with a 404(b) notice from the government, and then have, two to three weeks after it, motion in limine opening brief deadlines that apply to both of you, and opposition deadlines that apply to both of you if we're going to have a reply that would follow as well, and then to ask you to confer so that we don't needlessly have mirror image motions, that if you both intend to litigate the same thing, just discuss amongst yourselves who's going to be the movant and who's going to be the respondent.

With that in mind, and also understanding, from your

perspective, Mr. Waxman, that the resolution of the ArciTerra matters a lot here, there's a value in getting this and front-loading all this. So, right now, I think the notion had been, as proposed by the defense, a 404(b) notice on July 15, so if one were to do that, just thinking out loud here, you could have opening motions in limine two weeks after that, like July 29th, oppositions two weeks after that, which would be August 12th, and replies, which would be August 19th. I'm just spitballing. That also gets you all done before those last two weeks in August.

Mr. Waxman, is that a rational schedule?

MR. WAXMAN: It is, your Honor.

THE COURT: Mr. Rodriguez?

MR. RODRIGUEZ: Yes, your Honor. I just want to make sure I caught it correctly.

So July 15th for the government's notice?

THE COURT: For the government's 404(b) notice, and then July 29, August 12, and August 19 for opening motions in limine, oppositions, and replies successively.

MR. RODRIGUEZ: Very good, your Honor. That makes sense.

And one further thing is: The government will put this in its notice. I think most, if not all, of the items that I just described, the government is going to take the position that they're not 404(b), that they're direct evidence,

but, nonetheless, in the alternative, 404(b), so we will take that approach when crafting the notice.

THE COURT: I'll make the following record: We all, in this district, use 404(b) notices as one of several different jargon for basically bad or questionable acts or disputable evidence type of letter. It's sometimes referred to in racketeering cases as an enterprise letter, but it's the same thing. It's basically a fulsome document that sets out all of the stuff that logically ought to be in play on motions in limine. And so the denotation of it as 404(b) oughtn't limit what you include.

MR. RODRIGUEZ: Very good, your Honor.

THE COURT: That all sounds rational.

I'm disinclined, Mr. Waxman, right now to set a hearing date, and here's why: A big issue here is going to be whether there's a need for an evidentiary hearing. Until we know whether there is going to be a suppression motion, I don't know whether there's going to be a need for such a hearing on what's been previewed to me. It sounds like there's going to be a lot going on here. It may or may not be that, putting aside the suppression motions, I need an oral argument or I can resolve it on the basis of the submissions.

If, however, there is an evidentiary hearing, we need to gather. So my inclination would be to ask just for a prompt letter from you, Mr. Waxman, as to whether the suppression

motions are going to be made at all. I'm happy to adopt the schedule you all set with respect to that, but if that goes away, then the only motions practice we have, barring something unexpected, is the motions in limine.

MR. WAXMAN: Correct, your Honor. I think that's fine.

THE COURT: Okay.

So, look, I think I've got all this. Mr. Waxman, I'm inclined to adopt all the dates that Mr. Rodriguez represented as being undisputed — agreed to — and then put in place the additional dates of the 404(b) and the motion in limine briefing that I just covered.

Is that okay with you?

MR. WAXMAN: It is, your Honor.

THE COURT: All right.

Are there any other dates I need to set right now?

MR. WAXMAN: Not in my mind, your Honor. I do want to just raise the issue of my client's testimony in Indiana. If the government has a copy of that transcript, we would request that.

MR. RODRIGUEZ: It's been produced already, your Honor. I'm happy to point Mr. Waxman to the Bates number and such.

THE COURT: Look, I realize there is actually one other outstanding request, which is the government witness

list, exhibit list, and 3500 disclosure.

MR. WAXMAN: Correct, your Honor.

THE COURT: Mr. Rodriguez, as you know, under Rule 3500, I literally don't have the authority to compel the government to provide 3500 early. The other end, as you also know, in practice in this district, it is provided early with the timing turning on whether the volume, turning on whether it's likely to stir up additional evidentiary issues, and whether or not there are safety risks and so forth, and where that's the case, it's usually an argument that's directed to a small subset of the 3500. Have you given thought to when, in advance of trial, you're prepared to provide the 3500 material?

MR. RODRIGUEZ: Yes, your Honor, I have discussed that with defense counsel, and I mentioned that it's fully my expectation that we will be complying with our usual practice of producing 3500 in advance of trial. I think that that practice -- excuse me, that process will start about two weeks before trial. I do think that there are ways in which the parties can work things out so that it begins even earlier. For example, if we can eliminate the need for certain unnecessary witnesses and custodial witnesses and reach stipulations, we're happy to begin that process earlier.

THE COURT: Look, how voluminous is the 3500 material likely to be?

MR. RODRIGUEZ: I do not think that it is likely to be

voluminous, your Honor. For example, this is not a case with, at least as of right now — and certainly things could change — multiple cooperating witnesses or immunized witnesses or things like that.

THE COURT: May I ask whether you're prepared to state whether there are any?

MR. RODRIGUEZ: At this time, right now, there are not any witnesses in those buckets. That could change, but, right now, there's not.

THE COURT: Those are usually the big sources of 3500.

And are there witnesses who have, like, large amounts of prior testimony or things of that ilk?

MR. RODRIGUEZ: There are not any witnesses that have any prior testimony that I'm aware of. I think, as the Court will see, a lot of this is going to be records-based.

THE COURT: Right.

Look, your language is a little bit on the fuzzy side as to what you meant by the two weeks. I would certainly, at a minimum, appreciate, but that's all I can say, that you set a hard-and-fast deadline before the trial. The trial is October 15th. It seems to me that, at a minimum, you ought to be at least committing that all 3500 is produced two weeks before trial. I'd welcome it being earlier, but I think two weeks, given the absence of special factors here, makes that well within the band of ordinary practice.

MR. RODRIGUEZ: Understood, your Honor.

THE COURT: Are you comfortable committing to that?

MR. RODRIGUEZ: I am, your Honor, yes.

THE COURT: Now, witness list and exhibit lists, look, those are obviously changeable things, but in a heavy document case, Mr. Rodriguez, there is a real value for everybody getting those out there, not the least of which is that somebody's going to have issues about redactions, and there's going to be completeness and stuff like that. Is there a reason why you can't get, subject to your right to amend, a witness and exhibit list also two weeks before trial?

MR. RODRIGUEZ: We're happy to do so, your Honor.

THE COURT: All right.

So that's October 1. All right.

MR. WAXMAN: Your Honor, one point on prior testimony — and this goes, again, to ArciTerra — while there may not be prior testimony in connection with WeWork witnesses, there are a significant number of individuals who were former ArciTerra employees who have given depositions, and so this kind of ties in with 404(b).

THE COURT: Right.

No, look, I appreciate that, that depending on what comes out of all this, there might be witnesses who testify who have given prior statements that are within the government's possession and control or testimony of that ilk, or there might

not be. I mean, Mr. Rodriguez, at least in the proffer that he gave me up to the point I interrupted him, had discrete pointers for ArciTerra that wasn't obvious to me required, for example, a participant's testimony; e.g., the presence of civil lawsuits, for example, might not require the testimony of such a human being, or the Indiana developments vis-a-vis the receivership also might not be of that nature.

So understanding the theoretical potential, it's, by no means, clear that it's going to be realized.

MR. WAXMAN: Yes, your Honor.

And I know the Court's not taking my silence on the government's proffer on -- but we certainly contest --

THE COURT: You oppose everything?

MR. WAXMAN: Yes.

THE COURT: Right, got it. I appreciate it, but I assumed as much.

I want to set a next conference date in the case because there's a lot going on here, but my inclination is not to do it until early September.

Does anybody see a need — putting aside what the date will be — does anybody see a need, except if there's an evidentiary hearing generated by a suppression motion, for us to gather before then?

MR. RODRIGUEZ: No, your Honor.

MR. WAXMAN: None.

THE COURT: All right.

Then, look, if the motion-in-limine briefing is destined to be done by August 19th, my inclination would be to meet with you very soon after Labor Day, for example, Monday, September the 9th, at 10:30 a.m. And my hope would be that I would be in a position, if I haven't written an opinion resolving the various motions, to have a bench ruling that does that.

But, that way, at least you're getting an answer from me by that date, which is usefully some five weeks before trial. And I assume Mr. Rodriguez is aware of this from the U.S. Attorney's Office, but my practice as a judge is to really try to resolve things as clearly as possible and as much in advance as possible so that I can be active behind the scenes and be more of a church mouse during trial with you all having guardrails and clear rules and you can prepare well.

So, my hope would be, in part, in setting the schedule, to put myself in a position to rule so you know, for better or worse, what the ground rules are.

Are you free September the 9th?

MR. WAXMAN: I am, your Honor.

MR. RODRIGUEZ: Yes, your Honor.

THE COURT: All right. So September the 9th, at 9:30.

Look, once I see whether there's a suppression -- 10:30, sorry. I assume that doesn't change your answers.

Okay, one moment.

(Pause)

THE COURT: Government, Mr. Smallman wisely suggests, just to protect our calendar, that I set a final pretrial conference with you for Monday, October the 7th, at 10:30.

MR. WAXMAN: That's also fine for the defense.

THE COURT: I would need proposed voir dire and requests to charge from you. Why don't I get those from you two weeks before trial, let's say -- well, hold one moment.

Why don't we say on October the 1st, voir dire, requests to charge.

MR. WAXMAN: That's fine for the defense.

THE COURT: Just one other item I have for you.

Mr. Rodriguez, is there any chance of a superseder here?

MR. RODRIGUEZ: I have no reason to believe that there will be a superseding indictment from my office before October 15th. Obviously, I can't speak for other U.S. Attorney's Offices, but I have no reason to believe that there would be, unless your Honor's rulings change something, and we have to clean up the indictment, but it would be in the nature of, like, a cleaned-up trial indictment, not one adding new charges.

THE COURT: You're not going to add ArciTerra?

MR. RODRIGUEZ: That's the message I'm trying to send,

yes.

THE COURT: Okay.

I've now exhausted all the stuff I came here to raise with you. This has been very productive.

Mr. Rodriguez, is there anything else, any other way I can be helpful?

MR. RODRIGUEZ: Excuse me just one moment, your Honor?

THE COURT: We've already excluded time through the trial date, so I don't need to do that.

MR. RODRIGUEZ: We have.

Nothing further from the government.

THE COURT: Mr. Waxman?

MR. WAXMAN: Nothing from the defense.

THE COURT: All right. I will issue an order more likely tomorrow, just given the pace of my day, that clarifies all these dates.

Mr. Waxman, can we say that by the end of next week, I will get a letter from you as to your intentions vis-a-vis suppression?

MR. WAXMAN: Yes.

THE COURT: And if you are intending to move to suppress, please confer with Mr. Rodriguez so that the letter I get, which should have been reviewed by the government in advance, sets out, if you're intending to move to suppress, what each side's view is of what an evidentiary hearing would

likely cover. I'm trying to get a sense of, you know, one day or more, that kind of thing.

MR. WAXMAN: Correct. Yes, I certainly can do that, your Honor.

THE COURT: Very good.

So that's due a week from Friday.

MR. WAXMAN: Correct.

THE COURT: Very good.

We stand adjourned. Have a good summer, everyone.

Mr. Larmore, we stand adjourned. I hope you also have a good summer, and congratulations on the birth of your child.

THE DEFENDANT: Thank you, your Honor.

(Adjourned)